

**Earthjustice • Environmental Law & Policy Center •
Great Lakes Environmental Law Center • Michigan Land Use Institute •
Natural Resources Defense Council • Sierra Club**

December 21, 2012

Via First Class & Electronic Mail

Mary Ann Dolehanty
Permit Section Supervisor
Michigan Department of Environmental Quality
Air Quality Division
P.O. Box 30260
Lansing, MI 48909-7760

Re: Letter Urging Reconsideration of the Decision to Extend the Permit Expiration Date for Wolverine Power Supply Cooperative, Inc.'s Proposed Coal-Fired Power Plant, Permit No. 317-07

Dear Ms. Dolehanty,

Earthjustice, Environmental Law & Policy Center, Great Lakes Environmental Law Center, Michigan Land Use Institute, Natural Resources Defense Council, and Sierra Club, (collectively, the "Citizen Groups") write to urge the Michigan Department of Environmental Quality ("MDEQ" or "Agency") to reconsider its December 18, 2012 extension of the December 29, 2012 expiration date for the Clean Air Act Permit to Install 317-07 ("Permit") for Wolverine Power Supply Cooperative, Inc.'s ("Wolverine") proposed 600-megawatt coal-fired power plant ("Proposed Coal Plant") in Rogers City, Michigan. MDEQ did not notify the public of Wolverine's December 12, 2012 request for an extension, and the Citizen Groups only learned of the extension in a response to a FOIA request received yesterday, December 20, 2012. For the reasons set forth below, an extension of the Permit's expiration date is unlawful, arbitrary, and capricious.

The Permit for the Proposed Coal Plant was issued on June 29, 2011. The Permit includes a provision that, unless otherwise authorized by MDEQ, it "shall become void" if construction has not commenced within 18 months.¹ Wolverine has not commenced construction on the Proposed Coal Plant. As such, the Permit should expire by its own terms on December 29, 2012. Michigan regulations include a similar 18-month permit expiration deadline. Mich. Admin. Code R. 336.1201(4); *see also* 40 C.F.R. § 52.21(r)(2). Pursuant to these provisions, permit termination is automatic and, therefore, MDEQ need not do anything for the permit to expire on December 29, 2012. *Sierra Club v. Franklin County Power of Illinois, Inc.*, 546 F.3d 918, 923 (7th Cir. 2008) (if agency does not act to extend expiration date, permit "terminates by 'automatic expiration'"); *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 984 (9th Cir. 2004).

¹ MDEQ Air Quality Division, Permit to Install 317-07 Issued to Wolverine Power Supply Cooperative, Inc. (June 29, 2011), *revised* July 12, 2011, p. 4, General Condition 2.

MDEQ should reconsider its December 18, 2012 decision, and reject Wolverine's request to extend the expiration date. First, MDEQ is unauthorized to extend the Permit's expiration date because the Permit would allow Wolverine to install a coal plant that, by Wolverine's own admission, cannot be built and operated in compliance with the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") for coal-fired electric utility steam generating units, 40 C.F.R. Part 63, Subpart UUUUU, also known as the Mercury and Air Toxics Standards ("MATS"). Therefore, the Permit is illegal under MCL 324.5505(5). The Michigan Air Pollution Control Act provides that any air permit to install:

shall include terms and conditions necessary to assure compliance with all applicable requirements of this part, the rules promulgated under this part, and the clean air act

MCL 324.5505(5). Accordingly, MDEQ must deny applications for permits that would violate the Clean Air Act and, more specifically, NESHAPs. *See* Mich. Admin. Code R 336.1207(1)(c)(ii); Mich. Admin. Code R. 336.1299 (incorporating by reference NESHAPs).

The Permit currently contains emission limits for mercury and other hazardous air pollutants that were based on a case-by-case determination of the Maximum Achievable Control Technology ("MACT") for the Proposed Coal Plant. However, that determination, and the corresponding emission limits, also will expire on December 29, 2012. *See* 40 C.F.R. § 63.43(g)(iv)(4) (providing that a notice of MACT approval "shall expire if construction or reconstruction has not commenced within 18 months of issuance, unless the permitting authority has granted an extension which shall not exceed an additional 12 months"). MDEQ cannot extend its approval of the case-by-case MACT determination, because the United States Environmental Protection Agency ("EPA") adopted the MATS subsequent to MDEQ's initial approval. *See* 77 Fed. Reg. 9,304 (Feb. 12, 2012).²

Therefore, the "case-by-case" MACT determination, and the corresponding emission limits incorporated in the Permit, also should expire on December 29, 2012. With respect to the subsequently promulgated MATS, Wolverine has stated publicly on multiple occasions that the Proposed Coal Plant cannot be built in compliance with the standards. When the MATS rule was first issued, Wolverine's spokesperson asserted that Wolverine was not "able to get any of our vendors to guarantee that if they build it, it will meet the new standards."³ Accordingly, Wolverine announced it was suspending engineering work on the Proposed Coal Plant.⁴ Just weeks ago, Wolverine again announced that it would be unable to build the Proposed Coal Plant in compliance with the current MATS.⁵ Thus, the Proposed Coal Plant, as currently designed

² MDEQ's extension of the Permit by eighteen months is doubly unlawful. Pursuant to 40 C.F.R. § 63.43(g)(iv)(4), a notice of MACT approval cannot in any case be extended for longer than an additional 12 months.

³ Steve Schulwitz, *Wolverine hits a roadblock*, THE ALPENA NEWS (Jan. 13, 2012) (available at <http://www.thealpenanews.com/page/content.detail/id/520055.html>, and attached hereto as Exhibit A).

⁴ *Id.*

⁵ On the prospects of building the Proposed Coal Plant, Wolverine's spokesman stated: "It's a very slim possibility. It would require a number of things to happen, one of which would be the EPA would need to relax the new strict rules they have set on new generation to the point where it was possible to build the plant." Richard Lamb, *Hope remains for RC power plant, in wake of Wolverine agreement in Marquette*, THE PRESQUE ISLE ADVANCE (Dec. 3, 2012) (attached hereto as Exhibit B).

and described in the Permit, would violate the MATS—an applicable NESHAP adopted by EPA under the Clean Air Act and incorporated into Michigan’s rules. Mich. Admin. Code R. 336.1299.⁶ Pursuant to MCL 324.5505(5), then, the Permit is illegal and MDEQ cannot lawfully grant an extension.

Second, even if MDEQ *could* lawfully extend the deadline in the instant case, it is arbitrary and capricious for the agency to do so. The Permit should be allowed to expire on December 29, 2012. The 18-month permit expiration deadline serves two primary purposes. First, it helps ensure that major new polluting sources use the “most up-to-date control technology” and comply with current emissions requirements. *Utah Chapter of the Sierra Club v. Air Quality Bd.*, 226 P.3d 719, 728 (Utah 2009); *Kennon v. Air Quality Bd.*, 2009 UT 77, 2009 Utah LEXIS 209, at *19-20 (Utah Dec. 4, 2009) (remanding a permit approval for further review in light of insufficient evidence that the permitting agency employed a “sufficiently rigorous [BACT review] to ensure that an approval order implemented the best control technology”). Second, the 18-month permit expiration date prevents a company from indefinitely tying up allowable air pollution increments that could be put to better use by another proposed facility. *In re West Suburban Recycling & Energy Ctr., L.P.*, PSD No. 97-12, 8 E.A.D. 192, 195 (U.S. EAB Mar. 10, 1999). (“As PSD permits are issued, new emissions consume a portion of the PSD increment, thus shrinking the remaining amount available for new development. A facility with final permit approval, whether constructed or not, consumes PSD increment. Thus, permitted projects that are not constructed can prevent other projects from receiving PSD approval.”).

Both of these purposes demonstrate that MDEQ should not extend the December 29, 2012 expiration deadline for the Permit. First, the Permit should be allowed to expire so that, if Wolverine ever decides to try to move forward with the Proposed Coal Plant, that Plant would be required to use the most up-to-date pollution control technologies, and guaranteed to satisfy applicable standards. A primary purpose of the permit expiration provision is to ensure that major new polluting sources use the “most up-to-date control technology.” *Utah Chapter of the Sierra Club*, 226 P.3d at 728; *Kentucky Mountain Power v. Energy and Env’t Cabinet*, File No. DAQ-29109-030, 2009 WL 6214729, at *5 (Ky. Envir. Pub. Prot. Cab. Dec. 1, 2009). Satisfying this purpose clearly requires a re-evaluation of the BACT requirements in the Permit, which has not occurred here. *Utah Chapter of the Sierra Club*, 226 P.3d at 728. If MDEQ improperly decides to extend the December 29, 2012 expiration date, it must, at a minimum, re-evaluate the emission limits in the Permit to ensure compliance with BACT requirements and subject the proposed extension and new limits to public review and comment.

⁶ EPA currently is reconsidering certain new source standards for MATS, with a final reconsideration expected in March 2013. 77 Fed. Reg. 71,323. However, there is no evidence in the record that the Proposed Coal Plant could comply with the new proposed limits. For example, the new proposed mercury limit for plants like the Proposed Coal Plant is 0.003 lb/GWh, which is higher than the current MATS limit. *Id.* at 71,329. However, this new proposed standard is still more than twice as strict as the Permit limit of 0.0077 lb/GWh. MDEQ Air Quality Division, Permit to Install 317-07 Issued to Wolverine Power Supply Cooperative, Inc. (June 29, 2011), *revised* July 12, 2011, p. 27. Wolverine expressed uncertainty whether it could comply with even the existing Permit limit under worst-case scenarios. *See* Supplement to CAA Section 112(g) MACT Mercury-Amended at 19 (Aug. 2008) (describing the current Permit limit for mercury as posing a “technical risk” that the proposed boilers would be unable “to demonstrate 0.0077 lb Hg/GW-hr on a 12-month rolling basis”). In any case, the proposed limits are not final, and the appropriate standard for MDEQ to consider in making a decision is the MATS, with which the Proposed Coal Plant cannot comply.

The Permit for the Proposed Coal Plant was based on a permit application that originally was submitted in September 2007 and revisions that largely were complete by the end of 2009. As such, the permit application analyses already are three to over five years old, and an extension of the deadline would provide Wolverine with the opportunity to rely on even more outdated analyses. “Pollution control technology tends to improve over time,” *Sierra Club*, 546 F.3d at 927, and, therefore, extension of the expiration deadline for the Permit without any new BACT analysis would be improper. *See In re West Suburban Recycling*, 8 E.A.D. at 195 (“If construction is not commenced within [18 months] the approval to construct becomes invalid . . . [because] it is important that decisions about pollution control methods and associated emission limitations are made based on the most current information possible.”) (citing *In re New York Power Authority*, PSD No. 82-4, 1 E.A.D. 825, 826 (U.S. E.A.B. 1983) (revoking permit where U.S. EPA concluded that “there is no realistic prospect that construction of the project would commence” within 18 months of the effective date of the permit)).

Given this deficiency, MDEQ must deny any extension of the Permit expiration deadline and require Wolverine to apply for a new permit that satisfies all applicable requirements, if it attempts to pursue a coal plant in the future. *See* EPA Region IX Policy on PSD Permit Extensions, New Source Section Guidance Document 1-88 (Mar. 23, 1998, revised July 6, 1988, circulated September 8, 1988) (instructing that extensions should not be issued unless BACT is reanalyzed, increment consumption and air quality impacts are reanalyzed, and all new standards and regulations are complied with).

Second, the Permit should be allowed to expire because it is unjustifiable that the needless, prohibitively costly Proposed Coal Plant continue to tie up allowable air pollution increments. Wolverine has yet to begin construction on the Proposed Coal Plant. Instead, just weeks ago, Wolverine announced that it would enter into a joint venture under which it proposes to spend over \$130 million to retrofit and take an ownership interest of up to 40% in an existing 450-megawatt coal plant in Marquette, Michigan.⁷ This announced investment further demonstrates that Wolverine’s proposed brand-new 600-megawatt plant is unnecessary to serve the needs of Wolverine’s ratepayers.

Indeed, the Staff of the MPSC and MDNRE previously found that the Proposed Coal Plant was unnecessary in response to an Electric Generation Alternatives Analysis (“EGAA”) submitted by Wolverine in June 2009.⁸ In August 2009, several of the Citizen Groups submitted comments to MDEQ on the EGAA, which were supported by analyses from experts in the electric utility industry. (The comments are attached hereto as Exhibit E, and incorporated into this letter by reference). The Citizen Groups’ analysis demonstrated that there was not a need for the Proposed Coal Plant, because Michigan’s energy demand was flat, or even decreasing, and other options such as energy efficiency, demand management, combined heat and power,

⁷ See Kyle Whitney, *Revamped Presque Isle plant could be backbone of future power grid*, THE MINING JOURNAL (Nov. 29, 2012) (available at <http://www.miningjournal.net/page/content.detail/id/582185.html>, and attached hereto as Exhibit C).

⁸ See MDNRE’s May 21, 2010 letter denying Wolverine’s application for a permit to install, available at <http://www.deq.state.mi.us/aps/downloads/permits/pubnotice/317-07/DenialLtr.pdf>, and attached hereto as Exhibit D.

renewable energy, and existing natural gas capacity were sufficient to satisfy any demand. (*See id.* at 1).

The Staff of the MPSC agreed with this conclusion in a report submitted to MDEQ on September 8, 2009, and in a letter to then-Governor Granholm on May 21, 2010.⁹ In its report, MPSC's Staff found that (1) Wolverine had failed to demonstrate the need for the proposed facility to meet its projected capacity needs, and (2) Wolverine's forecasted demand growth of approximately 2% annually appeared questionable, or optimistic. (MPSC Staff Report at 3-4). Moreover, MPSC Staff found that the Proposed Coal Plant was, quite simply, a terrible deal for Wolverine's customers. According to the MPSC:

Using Wolverine's own cost estimates from its EGAA of \$89.25 per MWh, the cost of the new facility is double the cost of Wolverine's current wholesale power contract, resulting in a substantial increase in rates charged to [Wolverine] customers. Staff's analysis using a more current estimate of construction costs and including the cost of required transmission improvements results in an estimated cost increase of \$76.95 per month for a typical [Wolverine] customer. As noted in the Staff report on Wolverine's EGAA, the [Proposed Coal Plant] is one alternative out of a range of alternatives that may be used to fill the projected capacity need. Other alternatives could be used to meet all or portions of the projected capacity need and energy needs including: energy efficiency, load management, renewable resources, and a combination of alternatives, including purchased power. Most of these alternatives could provide capacity and energy to [Wolverine] customers at a substantially lower cost than the proposed Wolverine generation facility. *The proposed new facility would be a costly mistake for Co-Operative customers served by Wolverine.*¹⁰

The conditions for the Proposed Coal Plant are no better now than they were two years ago. The United States Energy Information Administration's ("EIA") early release overview of its 2013 Annual Energy Outlook—published two weeks ago—forecasts near-term declines, and long-term near-zero growth, in electricity consumption in Michigan's region.¹¹ Additionally, the economics of coal have not improved for Wolverine's consumers. As reported in the EIA's most recent annual report on coal use, Michigan pays significantly more per ton of coal for electric usage than both regional and nationwide average prices.¹² For 2012, Michigan's coal costs likely will be higher because increased shipping costs due to historically low lake levels.¹³

⁹ The MPSC Staff report is available at <http://www.deq.state.mi.us/aps/downloads/permits/pubnotice/317-07/9-8-09PSCStaffReport.pdf>, and attached hereto as Exhibit F. The letter from MPSC Staff to then-Governor Granholm is available at <http://www.deq.state.mi.us/aps/downloads/permits/pubnotice/317-07/PSCNotificationLtrtoGov.pdf>, and attached hereto as Exhibit G.

¹⁰ Ex. G, Letter From MPSC to Governor, at 2 (emphasis added).

¹¹ See U.S. EIA, Energy Consumption by Sector and Source, Table 3, available at http://www.eia.gov/forecasts/aeo/er/tables_ref.cfm, and attached hereto as Exhibit H.

¹² See U.S. EIA, Annual Coal Report 2011 at 56 (Sept. 2012), available at <http://www.eia.gov/coal/annual/pdf/acr.pdf>, and attached hereto as Exhibit I.

¹³ See Josh Sanburn, *On the Great Lakes, a Dry Summer Slows a Recovering Shipping Industry*, TIME (Oct. 3, 2012), available at <http://business.time.com/2012/10/03/on-the-great-lakes-a-dry-summer-slows-a-recovering-shipping-industry/>, and attached hereto as Exhibit J.

Appropriately, then, the available evidence throws into question whether Wolverine has any intention of ever constructing the Proposed Coal Plant. As stated above, Wolverine recently announced a joint venture to retrofit and take an ownership stake in WE Energies' existing Marquette plant. This announcement underscores what the MPSC and MDNRE found two years ago: that any needs that Wolverine might have could be filled by, *inter alia*, long-term power purchase options. (See Ex. D, MDNRE Ltr. to Wolverine, at 2). Indeed, Wolverine acknowledged just weeks ago that it does not now need the Proposed Coal Plant. Speaking about the possibility of building the Plant, a Wolverine spokesman stated: "It is a very slim possibility . . . [T]here are some other things that need to happen in respect to the economy where there is enough growth to warrant people deciding if that growth is going to be there to support building a brand new power plant."¹⁴ EIA's forecast demonstrates that it is completely unrealistic to hold out for a growth in demand sufficient to support a brand-new 600-megawatt coal-fired power plant, especially given that there are lower cost options for meeting such demand.

In other words, Wolverine is simply continuing to "wait-and-see" if it will construct the Proposed Coal Plant. The 18-month permit expiration deadline is designed to prevent exactly this kind of approach, however, as it improperly ties up air quality increments that could be used by other projects in the area. Extension of the permit expiration deadline would simply allow this wait-and-see approach to continue and, therefore, extension should be rejected.

For the foregoing reasons, the Citizen Groups urge MDEQ to uphold the requirements and goals of the Clean Air Act, reconsider the December 18, 2012 extension, deny Wolverine's request for an extension of the expiration deadline for the Permit, and allow the Permit for the Proposed Coal Plant to expire on December 29, 2012. We thank you for your time and consideration.

¹⁴ See Ex. B, Richard Lamb, *Hope remains for RC power plant, in wake of Wolverine agreement in Marquette*, THE PRESQUE ISLE ADVANCE (Dec. 3, 2012).

Respectfully submitted,



Andrew Armstrong
Staff Attorney
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
(312) 795-3738
aarmstrong@elpc.org

Thomas Cmar
Earthjustice
(312) 257-9338
tcmar@earthjustice.org

Nick Schroeck
Great Lakes Environmental Law Center
440 Burroughs Street, Box 70
Detroit, MI 48202
(313) 820-7797
nschroeck@wayne.edu

Hans Voss
Michigan Land Use Institute
Executive Director
hans@mlui.org

Jessie Rossman
Natural Resources Defense Council
2 N. Riverside Plaza, Suite 2250
Chicago, IL 60606
(312) 651-7923
jrossman@nrdc.org

Robb Kapla
Staff Attorney
Sierra Club
85 Second Street
San Francisco, CA 94105-3441
(415) 977-5760
robb.kapla@sierraclub.org